INSOLVENCY & RESTRUCTURING

To begin our Legal Focus on Insolvency and Restructuring, *Lawyer Monthly* speaks to Ross McDonough, Managing Partner and Head of Litigation at Campbells Legal in the Cayman Islands. Ross frequently acts in complex international insolvencies, restructurings and security enforcements and is regularly retained by local and overseas insolvency professionals, directors, fund administrators, auditors, creditors and investors in connection with all aspects of the restructuring and winding up of companies, investment funds, limited partnerships, SIV's and structured finance entities.

As an expert in insolvency and restructuring, what are the key pieces of advice you give your clients in order to avoid insolvency?

The most critical factor in avoiding liquidation is open communication with creditors, before the company is actually in default on its debts. By proactively managing creditor relationships, through regular and frank discussions, the company is more likely to achieve a negotiated arrangement which can stave-off liquidation and also save costs.

In what circumstances is insolvency actually the most positive outcome for a company?

An official liquidation is usually a last resort, but provisional liquidation can provide an important window of opportunity for a distressed company: for example, by providing protection against creditor claims, while the company seeks to negotiate a scheme of arrangement with creditors. This option is especially useful where the company is a trading entity, because it can allow the company to continue as a going concern; hopefully saving the company and its employees' jobs.

How complex are the rules that govern restructuring in the Cayman Islands and BVI?

The Cayman Islands' restructuring rules are not overly complex, and the day-to-day management of liquidations is generally efficient. With some exceptions, the court has a high degree of flexibility in its management of the insolvency process.

The British Virgin Islands' restructuring rules are similar to those in England and Wales and, as a result, provide comfort to stakeholders regarding what to expect. The refinement of the role of the Commercial Court under Bannister J over the last few years has also added greatly to the expertise and capacity of the High Court to effectively and efficiently deal with complex commercial matters.

What would you do differently if you could go back and start your career again?

I would have come to the Cayman Islands and started practising insolvency law in this jurisdiction earlier than I did.

What common challenges do clients face when looking to restructure a company in the Cayman Islands and BVI?

The most significant challenge is opposition from creditors, since their consent is necessary to achieve a successful restructuring. There are also some Cayman-specific issues such as the confidentiality laws; although they may be amended or repealed in the foreseeable future, they currently still present some practical issues in terms of sharing information with stakeholders. Overall, however, the courts are keen to facilitate an efficient and flexible insolvency/restructuring process that serves the best interests of the company and its creditors.

In BVI, the challenges are similar. With the steps taken to enhance the functioning of the Commercial Court, the importance of being prepared and "having a plan" cannot be over-emphasised. Accordingly, a client looking to restructure must involve its professionals and do its homework at the earliest stage to ensure that the proposed scheme of arrangement or restructuring makes commercial sense and will be acceptable (even if reluctantly) to creditors. Above all, it is key to be able to demonstrate that creditors and others will be in no worse a position (and hopefully better) than they would be if the restructuring did not occur.

How do you advise them on these challenges, as their lawyer?

Creditor co-operation is best achieved through pro-active dialogue, such as open communications via a liquidation committee. If the goal is to sustain the company as going concern, I try to help it to stave-off official liquidation, in favour of a provisional liquidation and a scheme of arrangement. The confidentiality issues are best addressed by seeking advance directions and guidance from the courts – for example, to facilitate open communications with stakeholders.

What legislative developments do you feel would benefit you and your clients, in relation to this field?

The legislative framework for Cayman restructuring is not especially detailed; this is double-edged because it permits the court flexibility, but also means that it can be harder to advise with certainty about whether a course of action will be acceptable. On balance, it would be useful to have a more detailed body of legislation or guidance.

In BVI, we perceive no need to embark upon the significant and fundamental statutory amendments to insolvency legislation which have been recently considered in other jurisdictions (such as Trinidad and Tobago and Jamaica). Recent experience has, however, shed light on the fact that there are occasional gaps in the insolvency legislation (such as provisions relating to the treatment and priority of unpaid redeeming members within a liquidation) which have to be filled by a liberal application of judicial interpretation. Notwithstanding the valiant efforts of the Courts to deal with these issues, we would expect that recommendations from the Bar Association and insolvency practitioners would permit such gaps to be filled when the Insolvency Act is next amended.

Is there anything else you would like to add?

No statutory regime is perfect and all contain lacunas. By thinking of creative ways to get round these deficiencies insolvency practitioners can add real value for their clients and the positive development of the law for the benefit of all. **LM**

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